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July 15, 1996

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: *Open Video Systems, CS Docket No. 96-46*

Dear Mr. Caton:

Enclosed for filing please find an original and five copies of the Opposition of TELE-TV to Petitions for Reconsideration Regarding Application of Program Access Rules to OVS and Incumbent Cable Operators' Use of OVS Capacity in the above-captioned matter.

Please date stamp the extra copy and return it to the individual delivering this package. Thank you for your assistance in this matter.

Yours sincerely,

Michael K. Kellogg

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
	)	
Open Video Systems	)	

OPPOSITION OF TELE-TV TO PETITIONS FOR RECONSIDERATION REGARDING APPLICATION OF PROGRAM ACCESS RULES TO OVS AND INCUMBENT CABLE OPERATORS' USE OF OVS CAPACITY

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July 15, 1996

TELE-TV opposes the cable industry's effort, through petitions for reconsideration, to thwart new competition from open video systems. Specifically, TELE-TV opposes petitions for reconsideration that ask the Commission to: (1) exclude OVS programming providers from the protection of the Commission's program access rules; (2) allow cable-affiliated programmers to enter into exclusive distribution contracts with cable-affiliated OVS programming providers; and (3) require that OVS operators open their systems to competing cable operators.

I. OVS PROGRAMMING PROVIDERS THAT OFFER MULTIPLE CHANNELS OF PROGRAMMING ARE MULTI-CHANNEL VIDEO PROGRAMMING DISTRIBUTORS

Rainbow Programming Holdings, Inc. ("Rainbow"), a wholly owned subsidiary of the cable operator Cablevision Systems Corporation, argues that it and other cable-affiliated satellite programmers have no duty to deal with OVS programming providers on a non-discriminatory basis, because those OVS programming providers are not multi-channel video programming distributors (MVPDs) under the 1992 Cable Act.[1] Rainbow simply misreads the language of the statute, which provides that an MVPD is "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." Communications Act of 1934, as amended by Telecommunications Act

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[1]Petition for Reconsideration of Rainbow Programming Holdings, Inc., CS Docket 96-46 at 17-18 (filed July 3, 1996) ("Rainbow Petn."); see Communications Act § 628 (program access requirements).

of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 602(13) (emphasis added). As long as an OVS programming provider makes available multiple channels of video programming to viewers, it is an MVPD afforded protection under section 628 of the Communications Act.

Rainbow notes that the examples given in the statutory definition of "MVPD" -- cable operators, MMDS providers, DBS operators, etc. -- all typically control the facilities over which they send programming to subscribers. Rainbow Petn. at 18. But the fact that most OVS programming providers will use another party's network has no relevance under section 602(13). The sole requirement, as the Commission's rules have long made clear, is that an MVPD "mak[es] available for purchase, by subscribers or customers, multiple channels of video programming." 47 C.F.R. § 76.1000(e).

Rainbow stresses Congress's failure, in the 1996 Act, to expand the illustrative list of MVPDs it set out in 1992. Rainbow Petn. at 17-18. But there was no need for such elaboration, for section 602(13) states that its examples are illustrative, not exhaustive. Moreover, Congress did indicate in the 1996 Act that OVS programming providers are MVPDs, inasmuch as it redefined "effective competition" for purposes of cable rate regulation to include a situation in which a "multichannel video programming distributor" offers programming to subscribers by using the facilities of an unaffiliated local exchange carrier. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56,

115, § 301(b)(3)(D) (adding new § 623(l)(1)(D) to the Communications Act).

II. THE COMMISSION PROPERLY RESTRICTED EXCLUSIVE CONTRACTS BETWEEN CABLE-AFFILIATED SATELLITE PROGRAMMERS AND CABLE-AFFILIATED OVS PROGRAMMING PROVIDERS

Rainbow, this time joined by the National Cable Television Association (NCTA), also argues that the Commission erred in requiring prior approval of exclusive contracts between cable-affiliated satellite programmers and cable-affiliated OVS programming providers.[2] Here, the cable interests ignore the Commission's powers under the 1992 Cable Act and grossly misstate the consequences of the Commission's new rule.

Rainbow and NCTA build their case on the observation that, in the 1996 Act, Congress did not require the Commission to address relationships between programmers and cable-affiliated OVS programming providers. They maintain that if Congress had meant to allow this, it would not, in section 653(c), have limited itself to directing that the Commission extend program access requirements to OVS operators. See Rainbow Comments at 6-9; NCTA Comments at 10-12.

Rainbow and NCTA ignore the difference between a congressional mandate (such as section 653(c)) and discretionary administrative authority: the fact that rules were not required does not mean that they are impermissible. Rainbow and NCTA also

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[2]Rainbow Petn. at 6-17; Petition [of NCTA] for Reconsideration, CS Docket 96-46 at 10-14 (filed July 2, 1996) ("NCTA Petn."); see Second Report and Order, Implementation of Section 302 of the Telecommunications Act of 1996 -- Open Video Systems, CS Docket 96-46, ¶¶ 181-194 ("Second Report and Order").

miss the key point that -- whereas new statutory authority was needed for the Commission to regulate the programming-related practices of OVS operators -- the Commission already had authority to regulate exclusive contracts entered into by vertically integrated satellite cable programmers and satellite broadcast programmers. Section 628 of the Communications Act authorizes "the Commission to regulate program access practices in a manner that w[ill] remedy (and thus eliminate) unfair and anticompetitive behavior," where such practices hinder MVPDs from providing programming to subscribers.[3] In particular, section 628(b) gives the Commission discretion to prohibit anticompetitive conduct by cable-affiliated satellite cable programmers and satellite broadcast programmers, "the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." Communications Act, § 628(b).

The Commission has explained that section 628(b) is a "clear repository of Commission jurisdiction" to address "barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming." First Report, 8 FCC Rcd at 3374. Because the Commission already had this authority,

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[3]First Report and Order, Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 3359, 3376 (1993) ("First Report"), aff'd, 10 FCC Rcd 3105 (1994).

Congress's failure to grant redundant powers in the OVS provisions of the 1996 Act is without significance.

Contrary to Rainbow's contention, moreover, the Commission's restrictions on exclusive contracts with cable-affiliated OVS programming providers directly furthers the congressional goal of allowing all OVS programming providers "to compete with each other on the platform on an equal basis." Rainbow Petn. at 10. Under section 628(j), OVS programming providers affiliated with the OVS operator may not enter into exclusive arrangements with OVS operator-affiliated programmers. See Second Report and Order, App. B at 150, proposing new 47 C.F.R. § 76.1507(a). If cable-affiliated OVS programming providers could enter into exclusive contracts with cable-affiliated programmers, they would have a regulatory advantage over their operator-affiliated competitors.

This advantage, moreover, would raise the precise problem Congress sought to address in 1992. As the Commission explained, incumbent cable operators maintain a "stranglehold" over critical programming that can be used to stifle new entry into the video delivery marketplace. Second Report and Order ¶ 189 (internal quotation marks omitted). If incumbent cable operators and their affiliated programmers could withhold their programming from competitors by entering into exclusive contracts, genuine competition to entrenched cable systems might never develop.

Furthermore, if such exclusive contracts were generally permitted, a local exchange carrier (LEC) that established an open video system would thereby open the door for cable-affiliated

programmers to deny the LEC's video distribution affiliate programming it "need[s] in order to provide a viable and competitive multichannel alternative to the American public." First Report, 8 FCC Rcd at 3362. LECs might well find this risk unacceptable and choose instead to be cable operators, contrary to the congressional goal of "encourag[ing] common carriers to deploy open video systems." S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 178 (1996).

Rainbow argues that the Commission's approach will discourage investment in new programming and "dramatically reduce the number and diversity of voices available through open video systems." Rainbow Petn. at 10-15. In fact, restrictions on exclusive contracts will not prevent the presentation of programming over open video systems or remove programmers' incentives to create new programming. Rainbow and other cable-affiliated programmers remain free to earn a profit on the sale of their programming to OVS programming providers. If the programming is attractive to viewers, OVS programming providers will line up to buy it. If, on the other hand, programming providers are not interested in purchasing the programming, the exclusivity rule will have no practical effect.

Moreover, subject to the Commission's rules regarding access by competing cable operators, see infra Part III, programmers are always free to lease OVS capacity and themselves provide programming to subscribers. The Commission's approach thus preserves what Rainbow has identified as "a programmer's dream:

direct access to the consumer unimpeded by an intermediary." Rainbow Petn. at 3 n.6.

Rainbow's arguments are further addressed by the Commission's waiver process. See Second Report and Order ¶ 193. Recognizing that exclusive contracts may "have pro-competitive effects under certain market conditions," id., the Commission has left room for such contracts where they are in the public interest -- for example, where exclusivity is necessary to allow development of new programming or serves to enhance competition between MVPDs.[4] This waiver process provides additional assurance that the Commission's rule restricting exclusive contracts will only enhance competition.[5]

NCTA makes the related argument that cable-affiliated programming providers that distribute their programming directly to OVS subscribers should be allowed to deny that same programming to other OVS programming providers, notwithstanding the requirements of section 628(c) and 47 C.F.R. § 76.1002. NCTA claims that such refusals to sell should be permitted because, by itself leasing OVS capacity, the programmer has "deal[t] with the OVS class of distributors." NCTA Petn. at 13.

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[4]See Second Report and Order, App. B at 152, proposing new 47 C.F.R. § 76.1507(b)(2) (incorporating public interest standards of 47 C.F.R. § 76.1002(c)(4)). See generally Memorandum Opinion and Order, New England Cable News, 9 FCC Rcd 3231 (1994) (granting waiver of Cable Act's prohibition on exclusive contracts).

[5]See, e.g., National Rural Telecom Ass'n v. FCC, 988 F.2d 174, 181 (D.C. Cir. 1993) ("So long as the underlying rules are rational . . . waiver is an appropriate method of curtailing the inevitable excesses of the agency's general rule.").

NCTA offers no support for its novel theory that a supplier who offers a product directly to retail customers should be deemed to be selling that product to a retailer. Even more important, section 628(c) prohibits unreasonable refusals to sell and other forms of discrimination "among or between . . . multichannel video programming distributors," not just against whole classes of distributors.[6] Thus, even if selling programming directly to subscribers were equivalent to supplying programming to a single (affiliated) OVS programming provider, that would not excuse a blanket refusal to sell programming to other OVS programming providers.

NCTA's arguments about "homogenizing all video distribution media" (NCTA Petn. at 14) also cannot carry the day. Congress rejected such theories when, in 1992, it required cable-affiliated satellite programmers to sell their programming to competing MVPDs on a nondiscriminatory basis.

III. THE COMMISSION REASONABLY DETERMINED THAT CABLE OPERATORS SHOULD NOT BE GUARANTEED ACCESS TO COMPETITORS' OVS NETWORKS

NCTA and Cox Communications, Inc. ("Cox") suggest that the Commission erred in giving OVS operators discretion to deny incumbent cable operators space on their OVS networks. TELE-TV already has explained why the Commission's approach is consistent

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[6]Communications Act § 628(c)(2)(B); see First Report and Order, 8 FCC Rcd at 3412 ("[O]ne form of [forbidden] non-price discrimination could occur through a vendor's 'unreasonable refusal to sell', including refusing to sell programming to a class of distributors, or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor.") (emphasis added).

with the text of the 1996 Act, congressional intent, and the public interest. See Reply Comments of TELE-TV, CS Docket 96-46 at 15-19 (filed Apr. 11, 1996).

For present purposes, therefore, it is necessary only to note that (contrary to NCTA's and Cox's claims) the 1996 Act does not give incumbent cable operators an "unqualified" right to use open video systems on the same terms as new entrants. NCTA Petn. at 8; Petition [of Cox] for Reconsideration at 6-7 (filed July 3, 1996). Rather, section 653(a)(1) expressly vests the Commission with power to issue regulations establishing which entities "may provide video programming through an open video system."

Nor does section 653(b)(1)(A) require that every potential programming provider have identical access to an open video system, regardless of public interest considerations. With regard to the terms and conditions of carriage, section 653(b)(1)(A) forbids only unjust or unreasonable discrimination by OVS operators. Moreover, while this section directs the Commission to issue rules prohibiting discrimination "among video programming providers with regard to carriage," it must be read in conjunction with section 653(a).[7] Giving both sections effect, the discrimination "among video programming providers" forbidden under section 653(b)(1)(a must be discrimination among those parties that are eligible to "provide video programming" under subsection (a)(1).

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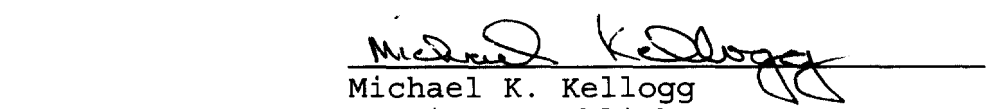
[7] See NCTA v. FCC, 33 F.3d 66, 74 (D.C. Cir. 1994) ("[B]oth the FCC and the court must, if possible, give effect to every phrase of the statute") (internal quotation marks omitted).

Finally, the Commission has not delegated its statutory authority to OVS operators by giving them the power to allow incumbent cable operators onto their systems. See NCTA Petn. at 8-9. The Commission has simply established a specific exception to the general rule that cable operators will not have access, which is well within its rulemaking authority.

CONCLUSION

The petitions for reconsideration should be denied insofar as they seek removal of program access obligations on cable-affiliated satellite programmers in the OVS context, or request that cable operators be given the right to occupy space on competitors' video distribution networks rather than developing their own facilities.

Respectfully submitted,



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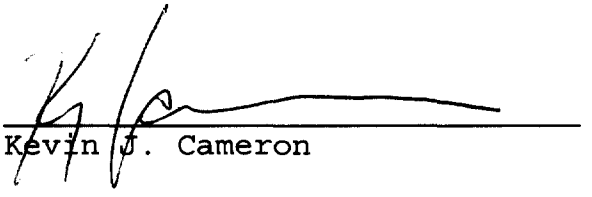
July 15, 1996

CERTIFICATE OF SERVICE

I, Kevin J. Cameron, hereby certify that on this 15th day of July, 1996, copies of the Opposition of TELE-TV to Petitions for Reconsideration Regarding Application of Program Access Rules to OVS and Incumbent Cable Operators' Use of OVS Capacity were served upon the parties listed on the attached service list by first-class mail, postage prepaid.



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